



SENATE BILL 15: Unemployment Insurance Law Changes

2015-2016 General Assembly

Committee:
Introduced by:
Analysis of: S.L. 2015-238

Date:
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SUMMARY: *S.L. 2015-238 makes numerous changes to the unemployment insurance laws as requested by the Division of Employment Security (DES) and recommended by the Joint Legislative Oversight Committee on Unemployment Insurance. The legislation combines three bills recommended by the Joint Legislative Oversight Committee on Unemployment Insurance into one bill.*

- *Part I of the act enhances the ability of DES to promote program integrity through the use of business intelligence and data analytics within the State's Government Data Analytics Center. The changes made by this Part became effective September 10, 2015. This Part also requires DES to make periodic reports on its program integrity efforts.*
- *Part II of the act makes several administrative and programmatic changes requested by DES. Those changes include the use of photo identification to receive unemployment insurance benefits, the ability of DES to use attachment and garnishment of a delinquent employer's credit card receipts to satisfy a judgment for unpaid employment taxes, and the modification of work search requirements. The changes made in this Part have various effective dates. Please see the complete summary for a more comprehensive explanation of the changes and their effective dates.*
- *Part III of the act confirms the Governor's appointments to the Board of Review, ratifies past unemployment appeal decisions, creates staggered terms for the members of the Board, and provides more clarity to the Board appointment process. This Part also directs the Program Evaluation Division to study the value provided to the State by the Board of Review. The changes made by this Part became effective September 10, 2015.*
- *Part IV of the act makes changes related to the unemployment insurance tax rate schedules. One of the most notable tax changes is a suspension of the 20% surcharge for the tax year 2016 if the amount in the State's account in the Unemployment Trust Fund equals or exceeds \$1 billion by March 1, 2016. The trigger is projected to be met by March 1st. The 20% surcharge generates approximately \$240 million. It also will begin charging benefits to an employer's account on a quarterly basis. The changes made in this Part have various effective dates. Please see the full summary for a more comprehensive explanation of the changes and their effective dates.*

PART I: ENHANCE UI PROGRAM INTEGRITY/REPORTING¹

The Joint Legislative Oversight Committee on Unemployment Insurance studied the program integrity efforts of the Division of Employment Security (DES). The Committee focused on improper payments

¹ Senate Bill 15; House Bill 22.

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and sought to discern how DES leveraged resources within the State's Government Data Analytics Center (GDAC). Part I requires DES to enhance its program integrity efforts through the use of business intelligence and data analytics. The act instructs DES to identify program integrity capabilities and use the capabilities of six listed sources:

- Government Data Analytics Center (GDAC)
- Southeast Consortium Unemployment Insurance Benefits Initiative (SCUBI).
- Office of Information Technology Services.
- Department of Health and Human Services.
- Department of Revenue.
- Office of State Controller.

Beginning October 1, 2015, DES must report quarterly to the Chairs of the Joint Legislative Oversight Committee on Unemployment Insurance, the Chairs of the Joint Legislative Oversight Committee on Information Technology, the Chairs of the House Appropriations Subcommittee on Natural and Economic Resources, the Chairs of the Senate Appropriations Committee on Natural and Economic Resources, and the Fiscal Research Division the following:

- UI overpayments, improper payments, and fraudulent payments.
- Fraud perpetrator information, by type and activity such as employee misclassification, SUTA dumping, fictitious employers, fictitious claimants, deceased claimants, and incarcerated claimants.
- Investigation activity, including type of investigation and the number of alerts received and investigated, the number of false positives, and the number of dispositions entered.

Beginning January 1, 2016, DES must report annually to the General Assembly the following:

- Methodology for UI program integrity investigation.
- State's Benefit Accuracy Measurement (BAM) as required by the US Department of Labor.
- Results of coordination efforts with the Office of Information Technology Services, the Department of Health and Human Services, the Department of Revenue, and the Office of State Controller.
- Plans for continued improvement of program integrity.
- Information in quarterly reports.

This Part became effective when the act became law, September 10, 2015.

PART II: UNEMPLOYMENT INSURANCE LAW CHANGES²

This Part made several changes both houses passed in House Bill 1069 of the 2013 Legislative Session³ and some additional changes requested by the DES. Unless provided otherwise, the changes made in this Part became effective when the act became law, September 10, 2015.

Section 2.1 authorizes DMV to disclose social security numbers to DES. The social security numbers are disclosed for the purpose of verifying employer and claimant identity. DMV obtains social security numbers upon an individual's application for an identification card, learners permit, or driver's license. DMV may only disclose the numbers as permitted by federal and State laws.

Section 2.2 modifies the work search requirement by increasing the number of job contacts a claimant must make each week from two to five and by eliminating the requirement that the claimant must make

² Senate Bill 16; House Bill 24

³ The Governor vetoed House Bill 1069, 2013 Session, for reasons unrelated to the changes made by this Part of the act.

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those contacts on two different days. To receive UI benefits, a claimant must be actively searching for work. Under current law, a claimant is considered to be actively searching for work if the claimant makes two job contacts with potential employers on two different days during a week. This change becomes effective January 1, 2016.

Section 2.3 eliminates the procedure to request reconsideration of decisions of DES and modernizes the language of G.S. 96-15(h). Under current law, a party to any decision of DES may request reconsideration of the decision. The decision is not final until the request for reconsideration has been decided. This change became effective October 1, 2015.

Section 2.4 corrects statutory references to the Division of Employment Security.

Section 2.5 clarifies the ability of DES to use attachment and garnishment of a delinquent employer's credit card receipts to satisfy a judgment for unpaid employment taxes. DES receives these funds directly from a credit card company or clearinghouse in discharge of the debt. DES must prevail in a civil action against an employer for unpaid employment taxes before it may use any collection remedy. G.S. 1-359 governs the manner in which debtors of a judgment debtor may satisfy an execution. Attachment and garnishment of credit card receipts is one of the ways that a debt may be satisfied.

Section 2.6 codifies an administrative requirement that claimants present a photo identification to receive UI benefits. DES began requiring UI claimants to present photo identification before receiving services in March of 2014. DES imposed the photo identification requirement to address fraudulent UI claims and create an audit trail. The photograph is evidence of the individual who committed fraud and aids prosecution of criminal offenses. US DOL supports program integrity measures such as requiring photo identification. US DOL provided a staff opinion that photo identification is a permissible eligibility requirement for UI claimants as part of the requirement to report to DES.

Valid photo identification requires the individual's photograph and must be one of the following documents:

- A driver's license, learner's permit, provisional license, or non-operator's identification card issued by North Carolina, another state, the District of Columbia, United States territory, or United States commonwealth.
- A United States passport.
- A United States military identification card.
- A Veterans Identification Card issued by the United States Department of Veterans Affairs.
- A tribal enrollment card issued by a federally recognized tribe.
- A traveler card issued by the United States Department of Homeland Security.
- Any other document issued by the United States or any state that the Division determines adequately identifies the individual.

Section 2.7 extended the deadline for adoption of DES rules from December 31, 2012, to May 20, 2015. DES met this deadline. The rules became effective by July 1, 2015. DES had largely been conducting its business in the absence of any rules governing its practices and procedures since December 31, 2012.

Section 2.8 sets the duration formula for unemployment benefits, which is used to determine the maximum number of weeks of eligibility, based only on unemployment rates. This section became effective July 1, 2015. Prior to this change, the formula also used a variable duration formula that determined the number of weeks for which claimants qualify within the range based on attachment to workforce. However, during the 2013-2014 interim, DES determined that the duration formula did not yield results less than 17 weeks. Therefore, when the maximum number of weeks based on the unemployment rate is 17 or less, claimants receive the maximum because the formula does not yield any

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results within the range. While this change may eliminate attachment to workforce as a factor in measuring duration, attachment to the workforce remains a factor in the calculation of the Weekly Benefit Amount (WBA) because the formula for the WBA is based on the wages received in the most recent two quarters.

Section 2.9 removes the requirement that DES notify employers via a FAX when a claim is filed. The purpose of the program is to notify employers of a claim. Today, through the State Information Data Exchange (SIDES) program, DES notifies employers electronically of separation information, and employers have the ability to respond electronically to that information. The provision of notice via FAX is antiquated and time consuming.

Section 2.9 also provides that a continuance may be granted only for the reasons prescribed by rule. The newly adopted DES rules specify the following grounds for a continuance: illness of the party; death in the immediate family of the party; a need to obtain an interpreter or translator; a religious observance; jury duty; actively seeking legal representation; court appearance unrelated to DES; active military duty; scheduling conflict created by employment; or to accommodate the business needs of the employer. The current statute provides that a continuance may be granted "for good cause", but it does little to define "good cause".⁴

Section 2.10 amends the definition of a "valid claim" to conform to the minimum weekly benefit amount that may be issued under G.S. 96-14.2(a). A person is not eligible for benefits if the weekly benefit amount is less than \$15. This section applies to claims filed on or after October 4, 2015.

PART III: DES BOARD OF REVIEW

In S.L. 2011-401, the General Assembly created a Board of Review to determine appeals policies and procedures and to hear appeals arising from the decisions and determinations of the Lower Appeals Department of DES. The Board consists of three members⁵ appointed by the Governor and confirmed by the General Assembly: one member representing employers, one member representing employees, and one member representing the general public. The member representing the general public is designated as the chair of the Board and must be a licensed attorney. The members serve four-year terms. The statute provides little guidance as to the appointment and confirmation process.

Beginning November 1, 2011, the Board of Review was the body statutorily charged with providing the second level of appeal. However, the Board was not appointed until December 6, 2013. In the absence of a Board, the Assistant Secretary of Commerce for DES, or the Secretary of Commerce's designee, provided parties with the second level of review. In a case before the Superior Court in Rowan County, the Court noted that the Assistant Secretary of Commerce for DES did not have the statutory authority to make those decisions. According to the testimony in the case,⁶ there may have been 13,000 lower level decisions appealed to the second level of review prior to the Governor's appointment of the Board of Review. A party who does not agree with a DES decision or determination may seek redress in the Superior Court. The failure to provide a second level of review in the form required by the statute (i.e., by a properly constituted Board of Review) does not harm a party who disagrees with a decision because the party has the ability to appeal to Superior Court.

Part III seeks to address several concerns related to the Board of Review:

⁴ DES' reason for requesting this change is to encourage its efforts in meeting timeliness and aging performance measures used by the US Department of Labor. Referencing petitioners to the rules for the list of reasons acceptable for a continuance may help alleviate the backlog in the appeals process.

⁵ G.S.96-4(b).

⁶ Wesley A. Lane v. N.C. Department of Commerce, Division of Employment Security, Rowan County Superior Court 13 CvS 1109.

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- The timely appointment of Board of Review members.
- The continuity of knowledge on the Board of Review.
- The legality of appeals decisions issued since November 1, 2011.
- The costs and benefits of having a Board of Review hear and decide higher appeal decisions.

Section 3.1, confirms the Governor's December 6, 2013, appointees to the Board of Review. This section negated the need for Senate Bills 11, 12, and 13 that would have confirmed each appointment separately. This section sets the length of the Board members' terms on a staggered basis to provide continuity of knowledge and experience as follows:

- The term for Jeanette Doran, the member appointed by the Governor to represent the general public, would expire in two years, June 30, 2015. She would continue to serve a second term (beginning July 1, 2015) and the length of the second term would be four years (expiring June 30, 2019).
- The term for Keith Holliday, the member appointed by the Governor to represent employers, would expire in three years, June 30, 2016.⁷ The second term, beginning July 1, 2016, would be a four-year term.
- The term for Stanley Campbell, the member appointed by the Governor to represent employees, would expire in four years, June 30, 2017.

Section 3.2 validates the second level appeals decisions made since November 1, 2011, in two ways:

- Provides that decisions made by the Assistant Secretary of Commerce for DES or the Secretary of Commerce's designee are validated and given the same legal effect as if the decision had been issued by the Board of Review.
- Provides that decisions made by the three individuals appointed by the Governor in December 2013 to serve on the Board of Review are validated and given the same legal effect as if the decision had been issued by the Board of Review.

Section 3.3 provides greater clarity and specificity to the appointment and confirmation process for the Board of Review. The appointment and confirmation process is similar to the current process for the appointment and confirmation of members serving on the Industrial Commission. Subsection (a) repeals the current subsection of G.S. 96-4 related to the Board of Review and replaces it in subsection (b) with a new statute dedicated to setting forth the confirmation process. Subsection (b) does the following:

- To help ensure independence of decision-making, it states the purpose of the Board of Review is to determine appeals policies and procedures and to hear appeals arising from the decision and determinations of DES. The Board and its staff must perform their job responsibilities independent of the Governor, the General Assembly, the Department of Commerce, and DES. It must perform its responsibilities in accordance with any written guidance promulgated and issued by US DOL.
- To help ensure continuity of knowledge and expertise, it creates staggered four year terms. It specifies that the terms begin on July 1 and end on June 30 of the fourth year.
- To help ensure timely appointment of Board members, it requires the Governor to submit the name of an individual to the General Assembly for confirmation on or before May 1 of the year of the expiration of the term. If the General Assembly does not confirm the nomination by May

⁷ The Governor will have to appoint a member to serve for the term beginning July 1, 2016, and the General Assembly will have to confirm that appointment during the 2016 legislative session.

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30, the office is considered vacant and the Governor must submit the name of another individual to the General Assembly for confirmation within 30 days. If the Governor fails to timely submit a nomination, then the General Assembly may fill the office.⁸

- When a vacancy occurs in an office of the Board of Review, the Governor has 30 days to submit the name of an individual to the General Assembly for confirmation to serve on the Board of Review. If the General Assembly fails to confirm the individual within 30 days of the submission, the office is considered vacant and the Governor must submit the name of another individual to the General Assembly for confirmation. If the Governor fails to timely submit a nomination, then the General Assembly may fill the office.
- If a vacancy exists when the General Assembly is not in session, the Governor may appoint an individual to serve on the Board of Review on an interim basis. The Governor must submit the name of the person serving on an interim basis to the General Assembly for confirmation within 14 days of the date the General Assembly convenes or reconvenes a Regular Session.

Section 3.4 directs the Program Evaluation Division of the North Carolina General Assembly to study the value provided to the State by the Board of Review. The study should include an analysis of other states, a cost-benefit analysis, the value derived from the appeals decisions of the Board, and any non-quantifiable value provided to the State by the Board.

PART IV. TAX CHANGES

Section 4.1 makes a technical change to move the date for the calculation of tax rates for certain employers from July 31 to June 30. The calculation is based on a 12-month period, and June 30 is the end of the calendar quarter. This change became effective for contributions payable for calendar quarters beginning on or after January 1, 2014.⁹

Section 4.2 begins charging benefits to employer's accounts on a quarterly basis, effective January 3, 2016, and applicable to claims effective on or after that date. Under current law, benefits are charged annually on August 1st. A benefit may not be charged until the claim's benefit year has expired. Compliance with these two provisions means there is a significant delay between the time benefits are paid and the benefits are charged. For example:

- Benefits paid on a claim opened on May 1, 2015, would not be charged to the employer's account until August 2016. The benefits charged on August 1, 2016, would impact the employer's 2017 tax rate and the employer's first tax payment for the 2017 taxable year would be May 1, 2017.
- Similarly, because of the annual computation date, the impact of benefits paid on a claim opened on August 1, 2015, would not be felt by the employer until the May 2018 tax payment.
- Likewise, although House Bill 4 passed in February 2013, the computation of the 2016 tax rates will be the first year that employers will realize the impact of the reduced maximum weekly benefit amount and the maximum duration of benefits in their benefit charges.

North Carolina is one of only two states that charge on an annual basis. Most states charge benefits quarterly. DES is currently developing a new benefit payment system with a consortium with South Carolina and Georgia. Both of these states charge benefits on a quarterly basis. If North Carolina remains on an annual basis, DES will be responsible for additional charges from the contractor for the

⁸ In an odd-numbered year, the recommendation would be made by the President Pro Tempore of the Senate. In an even-numbered year the recommendation would be made by the Speaker of the House of Representatives.

⁹ This section was in Part II of the original bill.

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variance in building the benefits system. DES requested this change to quarterly benefit charging not only for purposes of the new benefit payment system with our neighboring states, but also because a more frequent posting of benefit charges will help employers anticipate future tax liabilities, will help DES detect fraud quicker, and will allow North Carolina to make better use of federal reports by coming into compliance with federal reporting requirements.

The transition of moving from an annual benefit charging system to a quarterly one is expected to impact less than 20% of North Carolina employers.¹⁰ Employers who reimburse benefits paid may also feel some impact during the transition. The act seeks to reduce the impact on these employers by starting quarterly charging for claims that begin their benefit year on or after January 3, 2016. Beginning the quarterly charging in January allows DES to phase implementation over two charging cycles. Also, the 2016 tax year will coincide with the FUTA tax rate reduction¹¹ and with the likely suspension of the 20% reserve fund surcharge, as provided in Section 4.3 of the act.

Section 4.3 suspends the 20% surtax for the calendar year 2016 if the amount in the State's account in the Unemployment Trust Fund equals or exceeds \$1 billion by March 1, 2016. Under general law, the surcharge is suspended if the amount in the Trust Fund equals or exceeds \$1 billion on the August 1 computation date. Although the amount in the Trust Fund did not reach the targeted amount by August 1, 2015, it is anticipated that the target will be reached by the end of the year. The State's projected balance in the Trust Fund on December 31, 2015, is \$1,088,208,340.

The primary purpose of the Unemployment Insurance Reserve Fund is to provide a source of funds to pay interest payments due on federal advances so the State does not have to use General Fund availability for that purpose. The balance in the Reserve Fund may not exceed \$50 million or the amount of interest paid the previous September on federal advances. When the amount in the Reserve Fund exceeds the cap, the excess must be transferred to the State's account in the Unemployment Insurance Fund.

¹⁰ In calculating 2015 tax rates, 18% of employers had benefit charges to their account.

¹¹ North Carolina retired its debt to the federal government in May 2015. The FUTA tax rate increased \$21 per employee each year until the debt was retired. The FUTA tax rate is generally \$42 per employee a year. The FUTA tax rate for NC employers for the 2015 taxable year was \$105 per employee. The rate returns to \$42 for the 2016 taxable year.